NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

SIX4THREE, LLC,

Plaintiff and Appellant,

v.

FACEBOOK, INC.,

Defendant and Appellant;

MARK ZUCKERBERG et al.,

Defendants and Respondents;

A154890, A155334

(San Mateo County
Super. Ct. No. CIV533328)

Plaintiff Six4Three, LLC (Six4Three) and defendant Facebook, Inc. (Facebook) each challenge procedural rulings that led to an order granting an anti-SLAPP motion[1] filed by defendants Mark Zuckerberg and five other Facebook officers,[2] but denying a parallel motion filed by Facebook itself.

In 2015, Six4Three filed an action against Facebook alone. In 2017, in response to its fourth amended complaint, Facebook filed an anti-SLAPP motion. In 2018, while that motion was pending, Six4Three filed a fifth amended complaint adding the individual defendants to the action, and those defendants filed a parallel anti-SLAPP motion. The court heard the motions together. The court denied Facebook's motion as untimely because

[1] A special motion to strike a "Strategic Lawsuit Against Public Participation" (SLAPP) pursuant to Code of Civil Procedure section 425.16.

[2] The five other Facebook officers are Christopher Cox, Javier Olivan, Samuel Lessin, Michael Vernal, and Ilya Sukhar.

Facebook concededly could have brought such a motion in response to the initial complaint. The court granted the individual defendants' timely filed motion because the opposition to the motion, although appearing to have merit, exceeded the applicable page limit by incorporating by reference the arguments Six4Three had made in opposing Facebook's substantively identical motion.

We conclude that the court acted within its discretion in declining to consider Facebook's untimely motion but abused its discretion in granting the individual defendants' motion for violation of the page-limit rule.

Factual and Procedural History

Facebook's program enables users to share content with other users they have identified as "friends." In 2007, Facebook began making available to application (app) developers a set of services and application program interfaces (API) called "the Platform." The Platform enables developers to create apps that integrate with Facebook's "Graph," which comprises data about Facebook users, including their friend relationships, and content that the users post on Facebook. In 2010, Facebook introduced a tool called "Graph API" to standardize the data it makes available for developers to use in integrating their apps with the Facebook program. Graph API enabled developers to design an app to read and use content posted on Facebook not only by Facebook users who download the app, but also by those users' friends (unless the friends had set their privacy settings to bar such access).

In 2012, Six4Three developed an app called "Pikinis" that searches photos posted on Facebook for images of people wearing bathing suits. Six4Three used the Platform to design Pikinis to search not only photos posted by Facebook users who download the app but also photos posted by the friends of those users.

In April 2014—for reasons and with motives that the parties hotly contest—Facebook announced changes to the Platform and Graph API, to take effect in one year, that would, among other things, prevent apps from accessing content shared by the app user's friends. In January 2015, Facebook notified Six4Three of the change, and Six4Three ceased operations. In April 2015, Facebook implemented the change and

"depublished friend content from the Platform," i.e., made it no longer possible for apps—or, in Six4Three's view, for apps disfavored by Facebook—to access content posted by the app users' friends.

Six4Three commenced this action in April 2015, filing a complaint against Facebook alleging that the policy change had destroyed its business and asserting causes of action for promissory estoppel, interference with contracts and business relations, and violation of the Unfair Competition Law (UCL) (Bus. & Prof. Code, § 17200 et seq.). In May 2015, Facebook's counsel demanded that Six4Three dismiss the action because it was "frivolous and nothing more than an attempt to chill Facebook's valid exercise of its free speech rights," warning that Facebook "intends to seek its attorneys' fees and costs incurred in . . . bringing an anti-SLAPP motion challenging the lawsuit."

Rather than file such a motion, however, Facebook demurred. Six4Three responded by filing an amended complaint adding one cause of action. Facebook again demurred and the court sustained its demurrer with leave to amend. Six4Three filed a second amended complaint, and Facebook filed another demurrer, which was sustained as to one cause of action.

In March 2017, Six4Three sought leave to amend to add six individual defendants and four new causes of action. The trial court granted leave to add the new causes but not the new defendants. Six4Three then filed a third amended complaint and petitioned this court for a writ of mandate compelling the trial court to permit the addition of the individual defendants (No. A152116). Facebook filed a demurrer to the amended complaint, which was sustained in part with leave to amend, and moved for summary adjudication to limit the amount of damages Six4Three could recover.

In November 2017, Six4Three filed its fourth amended complaint, asserting contract, tort, and UCL causes of action based on alleged misrepresentations in Facebook's statements to developers about the future availability of Graph API data and its depublication of content posted by friends of users, applicable to Six4Three and others, while allegedly leaving such data accessible to favored developers. Facebook responded by filing an anti-SLAPP motion.

In December 2017, this court issued a writ of mandate compelling the trial court to allow Six4Three to add the individual defendants. A month later the court continued the hearing on Facebook's anti-SLAPP motion to enable the parties to brief two issues: (1) whether the conduct challenged by Six4Three constituted commercial speech (Code Civ. Proc., § 425.17, subd. (c)), which would remove it from the ambit of the anti-SLAPP statute, and (2) whether *Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294 (*Demetriades*) governs the outcome either of that question or of Facebook's defense under the federal Communications Decency Act of 1996 (CDA) (47 U.S.C. § 230).

Six4Three then filed a fifth amended complaint adding the individual defendants, and the parties filed supplemental briefs addressing *Demetriades* and the commercial-speech exemption.

On March 22, 2018, the California Supreme Court decided *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637 (*Newport Harbor*). The decision overturned prior precedent and held that "subject to the trial court's discretion under section 425.16, subdivision (f), to permit late filing, a defendant must move to strike a cause of action [as a SLAPP] within 60 days of service of the earliest complaint that contains that cause of action." (*Newport Harbor*, *supra*, at p. 640.) The trial court then ordered supplemental briefing on the effect of this new authority.

On May 3, the individual defendants filed their anti-SLAPP motion, which began: "Six4Three's allegations against the individual defendants are an attack on the same free speech rights at issue in Facebook['s] special motion to strike and should be stricken pursuant to the . . . anti-SLAPP statute . . . for the same reasons."

Six4Three's opposition to the individual defendants' motion stated simply that Six4Three "incorporates the arguments raised in its oppositions to Facebook's Anti-SLAPP motion, including the applicability of the commercial speech exemption," citing Six4Three's initial opposition to that motion and its three supplemental briefs addressing *Demetriades*, commercial speech, and *Newport Harbor*. Six4Three requested judicial notice of those briefs and attached copies as exhibits to voluminous attorney declarations comprising 431 exhibits and over 6,500 pages .

The individual defendants argued that the incorporation by reference of briefing on Facebook's anti-SLAPP motion was an improper attempt to circumvent the page limit set by California Rules of Court, rule 3.1113.[3] They also stated, incorrectly, that Six4Three had not addressed their arguments about immunity under the CDA: "that statute appears nowhere in Six4Three's opposition brief, and Six4Three does not even attempt to (improperly) incorporate other briefing by reference." In fact, two of the briefs that Six4Three incorporated by reference—its initial opposition to Facebook's motion and its first supplemental brief on *Demetriades*—address that issue under the headings, "The Activity in Question Does Not Trigger Section 230 Immunity . . ." and "The [CDA] Does Not Apply."

At the July 2018 hearing on both anti-SLAPP motions, the court pointed to rule 3.1113, which requires leave of court to exceed the page limit for motion papers, and asked Six4Three's counsel for authority "for the proposition that you can incorporate by reference many pages or arguments." The court pointed out that Six4Three had incorporated some 37 to 39 pages into an opposition limited to 15 pages without leave of court. Counsel responded that he had "to fall on [his] sword on that one."

The court issued a 19-page order declining to consider Facebook's motion as untimely and, treating the individual defendants' motion as unopposed, granting their motion. As to Facebook, the court acknowledged its discretion to consider a late-filed anti-SLAPP motion but held that Facebook had shown no compelling reason to do so. The court pointed to Facebook's failure to file such a motion after Six4Three asserted causes of action subject to the anti-SLAPP statute in all four prior versions of its complaint. The court rejected the argument that Six4Three's claims had been evolving, noting that " 'all . . . fault Facebook for deciding to depublish friends' photos' " and quoting counsel's letter threatening to file an anti-SLAPP motion as to the original complaint. The court found unpersuasive Facebook's argument that it justifiably relied on prior case law (*Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, disapproved by

[3] All undesignated references to rules are to the California Rules of Court.

Newport Harbor, supra, 4 Cal.5th at p. 646.) holding that the filing of an amended complaint renewed the right to file an anti-SLAPP motion even if the causes of action appeared in a prior complaint. Quoting *Newport Harbor*, *supra*, 4 Cal.5th at page 645, the court concluded that it was " 'far too late for the anti-SLAPP statute to fulfill its purpose of resolving the case promptly and inexpensively.' "

The court found that the individual defendants' motion established that the gravamen of Six4Three's causes of action was based on Facebook's decision to depublish user-created content, which entailed an exercise of speech rights that satisfied the defendants' burden under the first prong of the anti-SLAPP analysis of showing "that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech . . . in connection with a public issue.' " (*Loanvest I, LLC v. Utrecht* (2015) 235 Cal.App.4th 496, 501.) The court also observed, however, that "Facebook could arguably be 'engaged in the business of selling or leasing goods or services' and the commercial speech exemption might apply," in which case the challenged speech would be outside the scope of the anti-SLAPP statute. (Code Civ. Proc., § 425.17.) The court also noted that the analysis of CDA immunity in *Demetriades*, *supra*, 228 Cal.App.4th 294 "may apply," so that the CDA would not afford immunity for defendants' conduct. Six4Three therefore might be able to carry its burden under the second prong of the anti-SLAPP analysis to defeat the special motion to strike. Nonetheless, the court held that Six4Three had not "offered any contrary argument or cited to evidence," but merely incorporated by reference its briefs opposing Facebook's motion, without citing authority permitting such incorporation, and that this submission violated the page limitation in rule 3.1113(d). The court "exercise[d] its discretion to refuse to consider the incorporated briefing as part of [Six4Three]'s opposition or to permit [Six4Three] to file a page compliant opposition." Six4Three therefore had forfeited any claim that it was likely to prevail on any portion of its amended complaint. "Had [Six4Three] properly addressed the foregoing in its opposition," the motion "may have ended in a different result," but "that is not before the court."

Facebook timely appealed from the denial of its anti-SLAPP motion, and Six4Three timely cross-appealed from the grant of the individual defendants' motion. This court granted a joint motion to consolidate the two appeals.

Discussion

1. *The court acted within its discretion in declining to consider Facebook's motion.*

Facebook contends that the court abused its discretion in declining to consider its anti-SLAPP motion brought two and a half years—and four amendments—after Facebook was served with the initial complaint that Facebook's counsel immediately labeled a SLAPP. Facebook attempts to justify the delay by explaining that it withheld filing its anti-SLAPP motion in hopes of ridding itself of the action with an inexpensive demurrer, assuming, based on the prior case law, "that it could file an anti-SLAPP motion in response to a subsequent amended complaint if the cost-benefit calculation changed." It also argues that, *since* its motion was denied, Six4Three has released sealed documents in violation of court orders, confirming Six4Three's intent to use this litigation to harass Facebook through the media.[4]

Neither explanation establishes that the trial court abused its discretion in denying Facebook's motion as untimely. The Supreme Court in *Newport Harbor* focused on the Legislature's purpose in creating what is meant to be a " 'procedure for weeding out, at an early stage, *meritless* claims arising from protected activity.' " (*Newport Harbor*, *supra*, 4 Cal.5th at p. 642.) " 'The Legislature enacted section 425.16 to prevent and deter "lawsuits [referred to as SLAPPs] brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." [Citation.] Because these meritless lawsuits seek to deplete "the defendant's energy" and drain "his or her resources" [citation], the Legislature sought " 'to prevent SLAPPs by ending them early and without great cost to the SLAPP target.' " Given that purpose, the court held, defendants should not be free to file belated motions to strike causes of action

[4] Facebook's request for judicial notice of the transcript of a subsequent hearing regarding the allegedly improper document disclosure is denied for lack of relevance.

pled in prior versions of a complaint, as such a rule would enable gamesmanship and abuse without serving the statute's purpose. (4 Cal.5th at pp. 643–644.) The statute was not intended to enable a defendant " 'to obtain a dismissal of claims in the middle of litigation,' " but " 'to prevent costly, unmeritorious litigation at the initiation of the lawsuit.' " (*Id.* at p. 645.)

Facebook asserts that its delay is excusable because "anti-SLAPP motions generally require the parties to marshal . . . evidence," which it was attempting to avoid doing. However, the purpose of an anti-SLAPP motion is to weed out frivolous suits by requiring *the plaintiff* to marshal sufficient admissible evidence to make a prima facie showing that its claims have potential merit. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) A defendant imposes that burden on a plaintiff simply by showing that the complaint *on its face* targets conduct "in furtherance of a person's right of petition or free speech . . . in connection with a public issue."[5] (Code Civ. Proc., § 425.16.) Here, Facebook's counsel decided Facebook could better defeat the action by demurrer. That this assessment proved incorrect is no reason to allow Facebook to file a belated motion after the motion can no longer serve its intended purpose. Moreover, Facebook's account glosses over the fact that after its initial demurrer failed to secure a dismissal of the action, it responded to the first, second, and third amended complaints not by filing an anti-SLAPP motion, but by filing more demurrers—and eventually by filing discovery motions and even a motion for summary adjudication, on which it bore the burden of marshalling evidence.

Similarly, Six4Three's alleged misuse of materials obtained in discovery, if true, is not the type of abuse that the anti-SLAPP statute is intended to rectify. Other remedies address such misconduct.

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[5] Facebook's anti-SLAPP motion was not unusual in this regard: Of its nine exhibits, none was used to bear Facebook's burden at the first stage of the anti-SLAPP analysis, and shift to Six4Three the burden of showing a probability of success on the merits. Nor did Facebook rely, at the second stage, on affirmative defenses that required it to marshal evidence. (It did raise a defense of CDA immunity, but its argument relied solely on the pleadings, statutory text, and caselaw.) Facebook's motion did not require expensive or time-consuming marshalling of evidence on its part.

Facebook's reliance on the former rule that permitted defendants to file an anti-SLAPP motion whenever a complaint was amended is also unavailing. Facebook's counsel may have thought Facebook could hold an anti-SLAPP motion in reserve, but there was no reason to presume that amended pleadings would be filed. Whether or not Facebook's cost/benefit calculations were sensible, the fact remains that the belated motion was filed after two and a half years of litigation. As the Sixth District noted in affirming a court's exercise of discretion not to consider a belated anti-SLAPP motion, "No showing of blamelessness or justification on the part of the defendant can restore what time has destroyed." (*Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal.App.4th 1174, 1192).

Facebook deems it unfair to apply the rule of *Newport Harbor* retroactively to bar the motion it eventually filed. But the Supreme Court did not state in *Newport Harbor* that its new rule would apply only prospectively, and "the general rule [is] that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation" unless there is a "compelling reason" based on "considerations of fairness and public policy" to make an exception to that rule. (*Peterson v. Superior Court* (1982) 31 Cal.3d 147, 151–152.) Facebook contends that such considerations apply here to the trial court's exercise of discretion. While it would have been within the trial court's discretion to rely on such considerations to hear Facebook's motion, the failure to do so was not an abuse of discretion. Applying the *Newport Harbor* rule did not create an unfairness affecting the outcome of the litigation. The procedural change did not "bar a cause of action filed in reliance on the former rule" so as to leave Facebook without " 'any remedy whatsoever.' " (*Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 990.) Facebook may still obtain any relief to which it is entitled through other pretrial motions, including summary judgment or summary adjudication motions, or eventually at trial.

In short, the court did not abuse its discretion in denying Facebook's motion as untimely.

2. *The court abused its discretion in granting the individual defendants' motion.*

The trial court granted the individual defendants' motion because Six4Three's opposition to the motion exceeded the permissible page limit by incorporating by reference the lengthy memoranda with which it opposed Facebook's identical motion. The parties dispute whether rule 3.1110(d), which specifies the manner in which a party must refer to a "paper previously filed," authorizes a party to incorporate by reference arguments made in prior filings for another motion. Rule 3.1110(d), however, does not purport to govern *whether* or *when* a party may incorporate by reference papers previously filed, or which types of papers may be incorporated. The court rejected Six4Three's opposition because, by incorporating some 37 to 39 pages of prior briefing, Six4Three's counsel circumvented the page limit set by rule 3.1113(d) without obtaining leave to exceed that limit. The individual defendants cite federal decisions rejecting such uses of incorporation by reference to evade page limits. (E.g., *Gaines-Tabb v. ICI Explosives, USA, Inc.* (10th Cir. 1998) 160 F.3d 613, 623–624.) We do not question that the state court may also decline to consider arguments incorporated by reference if the incorporation enables the party to exceed applicable page limits without leave. But we do not agree that the court may, in the first instance, grant what in effect is a terminating sanction in response to the submission of such papers.

A court presented with papers exceeding the page limit has many options, including ordering the offending papers to be stricken and requiring the submission of papers that conform to the rule or to a page limit specified by the court. But granting a case-dispositive motion without providing an opportunity to correct the deficiency is an abuse of the court's discretion. California has a strong policy in favor of resolving cases based on their merits, not procedural deficiencies. (See, e.g., *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 585; *Thatcher v. Lucky Stores, Inc.* (2000) 79 Cal.App.4th 1081, 1085.) As the trial court's order makes clear, the commercial-speech and CDA arguments raised in Six4Three's opposition to Facebook's motion have potential merit.[6] Rejecting

[6] We do not here pass on the merit of those contentions.

those arguments solely because the opposing papers were too long exceeds the bounds of judicial discretion. In *Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, the Second Appellate District relied on "the strong public policy in favor of deciding cases on the merits" to reverse a ruling as an abuse of discretion because it was "tantamount to a terminating sanction" based on poor practice by counsel, which a lesser sanction could have redressed: "[W]hatever counsel's shortcomings . . . , it is the rights of the client, not the lawyer, which are at stake here, and there is no showing that the [client] did anything to warrant the result reached . . . ." (*Id.* at pp. 1399–1400.)

Quoting *Landy v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 698, the individual defendants argue that the policy favoring trial on the merits " 'cannot be indiscriminately applied so as to render impotent' " procedural rules. But *Landy* construes the statute authorizing dismissal for failure to prosecute (*ibid.*, citing Code Civ. Proc., § 583.410)—a provision that, for obvious reasons, specifies dismissal as the sanction for a violation. More apposite are cases involving discovery abuse, which make clear that a court should not impose terminating sanctions unless it finds that less severe sanctions will not yield compliance. (E.g., *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279, overruled on other grounds in *Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259.)[7]

Accordingly, the order must be reversed insofar as it grants the individual defendants' motion on the ground that it was effectively unopposed. While Six4Three asks us to rule on the merits of the defendants' motion, we decline to do so. The factually oriented arguments, which possibly may resolve some but less than all of Six4Three's claims, are more appropriately resolved by the trial court in the first instance.

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[7] The individual defendants allude to this concept by noting that the court had previously admonished counsel for Six4Three not to "overuse footnotes in order to get around page length limitations" and not to cross-refer to a document that cites supporting evidence instead of attaching the evidence. But in granting the individual defendants' motion, the court did not mention such prior abuse, let alone make a finding that a terminating sanction was warranted because lesser sanctions had proven insufficient to induce Six4Three's counsel to comply with the rules.

Disposition

The order is affirmed insofar as it denies Facebook's anti-SLAPP motion and is reversed insofar as it grants the individual defendants' anti-SLAPP motion. The matter is remanded for further proceedings consistent with this opinion.[8] The parties shall bear their respective costs on appeal.

POLLAK, P. J.

WE CONCUR:

STREETER, J.
TUCHER, J.

[8] In the event that the court grants the individual defendants' motion in whole or in part, we do not preclude the court from reconsidering its order with respect to Facebook's motion.